

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAMIEN ORLANDO HOLLOWAY,

Defendant-Appellant.

UNPUBLISHED

May 13, 2003

No. 237006

Berrien Circuit Court

LC No. 2000-405126-FC

Before: Saad, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals by right from his conviction of felony murder, MCL 750.316, assault with intent to murder, MCL 750.83, carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced him as a third-offense habitual offender, MCL 769.11, to life imprisonment without the possibility of parole for the felony murder conviction, life imprisonment for the assault and carjacking convictions, and two years' imprisonment for the felony-firearm conviction. We affirm.

This case stems from the shooting death of Patrick Robinson, the wounding of Johnnie Williams, and the theft of Eli Walker's 1983 Chevy Caprice in Benton Harbor. The following sequence of events was elicited at trial: On the evening of September 30, 2000, Walker's car was parked on Pavone Street in Benton Harbor. The wheels on the Caprice had special twenty-inch rims. Walker, Williams, Robinson, and Steve Bates were standing around the car, and Walker was wiping down the Caprice with a towel. Defendant and his friends Jarrett Crisler, Keenan Collier, and Michael Clay drove from Gary, Indiana, to Benton Harbor that evening to go to some clubs. They saw the car with twenty-inch rims while driving around, and defendant and Crisler started talking about how they wanted the rims. They followed the car to the area of Pavone Street, drove around the block several times, and saw the four men standing around the Caprice. Defendant and his friends pulled up on a side street and parked. Crisler had a .45 caliber gun and defendant had a .38 caliber gun, and they walked up to the four men and started shooting. Crisler and defendant then stole the Caprice and drove back to Gary, followed by Collier and Clay in the separate vehicle. Williams was shot in the leg and the back. Robinson was shot in the back and died from the gunshot wound. Defendant was subsequently found in Gary, Indiana, where he ultimately confessed.

On appeal, defendant argues that the trial court erred in its determination that the prosecutor exercised due diligence in attempting to locate Michael Clay, a *res gestae* witness,

and in admitting Clay's preliminary examination testimony. We disagree. A trial court's determination that the prosecutor has exercised due diligence in attempting to locate a *res gestae* witness for trial will not be disturbed on appeal absent a clear abuse of discretion. *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998). Here, the trial court properly determined that the prosecutor exercised due diligence in attempting to locate Clay for trial.

The Sixth Amendment of the United States Constitution and § 20 of article 1 of the Michigan Constitution of 1963, grant an accused the right "be confronted with the witnesses against him. . . ." *People v Dye*, 431 Mich 58, 64; 427 NW2d 501 (1988). The Sixth Amendment applies to the states through the Fourteenth Amendment. *Id.* at 64, n 7. "[T]he purpose of the Confrontation Clause is to provide for a face-to-face confrontation between a defendant and his accusers at trial. This confrontation is an important right of the defendant because it enables the trier of fact to judge the witnesses' demeanors." *Dye, supra* at 64 (footnote omitted).

Our Supreme Court has held that "the constitutional right to confront one's accusers would not be violated by the use of preliminary examination testimony as substantive evidence at trial only if the prosecution had exercised both due diligence to produce the absent witness and that the testimony bore satisfactory indicia of reliability."¹ *Bean, supra* at 682-683 (footnote omitted). MCL 768.26 sets out the general rule that preliminary examination testimony may be used by the prosecution whenever the witness giving such testimony cannot, for any reason, be produced at trial. As noted in *Bean, supra* at 683, a prosecutor may present the preliminary examination testimony of a witness if the witness is unavailable as explained in MRE 804(a)(5). MRE 804(a)(5) states, in part, that a declarant is unavailable if he "is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown."

The *Bean* Court stated that

[t]he test for whether a witness is "unavailable" as envisioned by MRE 804(a)(5) is that the prosecution must have made a diligent good-faith effort in its attempt to locate a witness for trial. The test is one of reasonableness and depends on the facts and circumstances of each case, i.e., whether diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it. [*Bean, supra* at 684.]

Moreover, this Court has held that "[d]ue diligence requires that everything reasonable, not everything possible, be done." *People v Whetstone*, 119 Mich App 546, 552; 326 NW2d 552 (1982).

In the instant case, the record reveals that the prosecution exercised ample due diligence in attempting to produce Clay. Clay appeared and testified at the preliminary examinations of defendant and codefendant Crisler. Although Clay did not appear for the original trial date, he

¹ Defendant does not raise an issue on appeal with respect to the "satisfactory indicia of reliability" portion of this test.

had not been served with a subpoena. When Clay did not appear for the trial, the prosecutor contacted Thomas Mize, a criminal investigator, the very same day, asking Mize to find Clay and serve him with a subpoena for the new trial date. Clay returned from North Carolina to Indiana upon Mize's request, and once in town, called Mize to come pick him up. Mize then went to Gary, picked Clay up, and brought him back to Michigan, where he personally served Clay at the Berrien County courthouse. Clay gave Mize several phone numbers where he could be contacted and assured Mize that he would appear for defendant's trial. Mize relied on his thirty-two years of police experience and his understanding of people in determining that Clay would voluntarily return for defendant's trial.

Mize indicated that when he began checking on Clay's whereabouts a few days before trial, he was exercising caution and simply wanted to be positive that Clay would appear; there was no triggering event or information that led him to do so. The day before trial, Clay left Mize a voicemail message indicating that he was reluctant to come to court. Even then, Clay did not definitively say that he would not come to court, but rather, that he did not want to come and hoped that Mize would not make him come to court. Up until and during trial, Mize and detectives from the Gary police department increased their efforts to locate Clay but were ultimately unsuccessful. This Court has held that a prosecutor is "not required to exhaust all avenues for locating [a witness], but ha[s] a duty only to exercise a reasonable, good-faith effort in locating him." *People v Briseno*, 211 Mich App 11, 16; 535 NW2d 559 (1995). It is clearly evident that in light of the facts of the instant case, the trial court's determination that the prosecutor exercised due diligence in its attempt to produce Clay – and that Clay's preliminary examination testimony was therefore admissible – was not an abuse of discretion.

Defendant next argues that his confession was not given voluntarily and should have been suppressed. When reviewing a trial court's determination of the voluntariness of a confession, we must examine the entire record and make an independent determination of voluntariness. *People v Sexton*, 458 Mich 43, 68; 580 NW2d 404. We will affirm a trial court's determination "unless we are left with a definite and firm conviction that a mistake has been made." *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

When a defendant challenges the admissibility of his statements, the trial court must hear testimony regarding the circumstances of the defendant's statement outside the presence of the jury. *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965). Whether the defendant's statement was knowing, intelligent, and voluntary is a question of law which the court must determine under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27 (Boyle, J.), 44 (Weaver, J.); 551 NW2d 355 (1996).

At the *Walker* hearing, defendant argued that his statement to the police should be suppressed as involuntary because it was given after he attempted to ingest Wite-Out. Detective Dennis Buller testified that he was present at the Gary police station when defendant was brought in on October 2, 2000. Buller, defendant, Detective Raynard Shurn, and Corporal Cory House went into the interview room. Buller read defendant his *Miranda*² rights, and defendant stated that he understood his rights and would talk with the detectives.

² *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

During a break in the interview, a Gary police officer found Buller and told him that defendant drank some Wite-Out. Buller went back to the interview room and learned that the paramedics had been called. Defendant had Wite-Out all over himself. Buller testified that defendant had more Wite-Out on him than he ever could have had in him. The paramedics examined defendant and told Buller that he would be okay but that he should be taken to be checked when the police were done; the paramedics evidently conveyed no sense of urgency about having defendant examined.

According to Buller, he asked defendant whether he wanted to continue with the interview, and defendant said yes. Defendant did not say he wanted to go to the hospital or obtain medical treatment before continuing. Defendant never said he felt ill and did not appear to be ill. In the second interview, defendant gave a different account of events, and Buller wrote out defendant's statement verbatim. Buller read the statement out loud to defendant and gave defendant the written statement to review and to initial any mistakes or make additions or deletions. Defendant said the statement was the truth and signed and dated it.

Defendant testified that he signed a card waiving his right to remain silent. He told the police he would cooperate with them and that he would answer questions, and he never requested an attorney or requested that the interview stop. Defendant testified that it seemed like the police were forcing him to answer questions with "verbal assault" because he answered some questions with a yes or no answer. Defendant testified that he drank Wite-Out because he was scared and pressured and wanted the police to stop questioning him. He "knew" drinking the Wite-Out would result in his being taken to a hospital. After he drank it, he felt nauseated and light-headed but was "still thinking clearly." Defendant claimed that he asked to go to the hospital but that the police told him that he could not go until he gave them a true statement. He admitted that the police never told him what they wanted him to say. He claimed that he did not believe he would get the treatment he needed if he did not give the police a statement. Defendant testified that he would not have given a statement to the police if they would have taken him to the hospital for treatment. He was at the police station for about an hour after he drank the Wite-Out.

Defendant testified that he told Buller the words to put down in his statement, but he claimed that he did not read it himself or have it read back to him. However, defendant knew what it contained, because he gave Buller the statement as he wrote it down and believed that Buller was writing down what he said. He claimed that he initialed the statement so he could get to the hospital. Buller showed him where to put his initials. Defendant claimed that no paramedics came to the police station to examine him and that neither of the accounts he gave to the police were the truth.

The trial court found that defendant was properly advised of his *Miranda* rights and waived them before he gave a statement. The trial court was satisfied that the statement was freely, voluntarily, knowingly, and accurately given and was not caused by coercion or by ingestion of the Wite-Out. The trial court denied defendant's motion to suppress the statement.

Our Supreme Court has set forth a nonexclusive list of factors for the trial court to consider in determining whether a statement is voluntary. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). No single factor is determinative, and "[t]he ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id.*

This Court has held that it will “defer to the trial court’s superior ability to view the evidence and witnesses” *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997). The trial court believed the testimony of the detectives that the paramedics examined defendant at the police station and determined that he was all right but that he should probably be checked out at a later time. The trial court also believed the testimony of the detectives that defendant never asked for medical treatment or requested that the interview stop. Therefore, it cannot be said that defendant was deprived of medical attention. Although defendant testified that he felt nauseated and light-headed after drinking the Wite-Out, he admitted that he was thinking clearly. No evidence was presented that defendant was physically abused or threatened with abuse, and defendant admits on appeal that “it was established he could read and write.” After examining the totality of the circumstances surrounding defendant’s statement, we are not left with a definite and firm conviction that the trial court erred in finding that defendant’s statement was voluntary.

Affirmed.

/s/ Henry William Saad

/s/ Patrick M. Meter

/s/ Donald S. Owens